## PUBLIC PROSECUTOR v. EUROPE MOTORS SDN. BHD. & ANOR.

**[A.Cr.J. (Mohamed Azmi J.) April 2, 1981]**

**[Kuala Lumpur — Federal Territory Criminal Appeal No. 49 of 1980]**

*Customs & Excise — Motor Vehicle — Import of "used cars" — Fraudulent evasion of prohibition — "Used cars", "Old cars" and "New cars", meaning explained — Customs Act, 1967, ss. 135(1)(g) & 139 — Customs (Prohibition of Imports) Order, 1978.*

The Public Prosecutor in this case appealed against the decision of the lower court in acquitting and discharging both the respondents of the offence under section 135(1)(g) of the Customs Act, 1967. The first respondent was charged for being knowingly concerned on December 15, 1978, in a fraudulent evasion of a prohibition relating to 5 units of new Porsche cars under the Customs (Prohibition of Imports) Order, 1978, and the second respondent was charged for abetting the first respondent, an offence under section 135(1)(g) read together with section 139 of the Customs Act.

The appellant contended that the learned President had erred in law and in fact in holding that the five Porsche cars were "used cars" when he held in his grounds of judgment that "once the cars were registered, it would mean that they were the subject of a retail sale", without adequately considering the other factors which would make the said cars "new cars".

The facts revealed that the first respondent's application for Approved Permit to import new Porsche cars was rejected vide Ministry's letter of November 25, 1978. Before the rejection letter was received, the first respondent had made another application of September 26, 1978 for Approved Permit to import five units of "any make of used passenger cars/station wagons at $10,000 per unit from West Germany, Japan or England". This application was approved on October 5, 1978. The respondent contended that the five cars were legally "used" when they were imported. The learned President acquitted them without calling for their defence.

**Held,** allowing the appeal: (1) there must be substantial usage of the car before it ceases to be new and can qualify as "old";

(2) a car ceases to be "new" if, firstly, it has been the subject of a retail sale with a dealer or distributor, and, secondly, it has been the subject of substantial use, in that the mileage it has travelled under its own power has significantly exceeded that to be expected as reasonably incidental to delivery from the point of manufacture to the dealer or distributor;

(3) the registration book was not a document of title to the car. Thus, merely because the cars in the present case were in the registered name of the five persons on importation it does not follow that they were the legal owners and that there had been a retail sale;

(4) in this case the learned President had failed to consider evidence adduced by the prosecution which showed that at the time of importation there was in fact no retail sale; that the five persons in whose names the cars had been registered were not the purchasers or legal owners; that there was no substantial usage of the cars by any of the purported purchasers or their agents; and that on importation, three of the cars were in fact sold as new cars by retail sale to *bona fide* customers;

(5) the order of acquittal and discharge should be set aside and the case should be remitted to the same President for the defence to be called.

*Cases referred to:-*

(1) *R.* v. *Ford Motor Co. Ltd.* [1974] 1 W.L.R. 1220.

(2) *Morris Motors Ltd.* v. *Lilley* [1959] 3 All E.R. 737.

(3) *Central Newbury Car Auctions, Ltd.* v. *Unity Finance, Ltd. & Anor.* [1956] 3 All E.R. 905.

(The following cases were also cited but not mentioned in the judgment: *Public Prosecutor* v. *Lee Kee Chang* [1974] 2 M.L.J. 15; *Tan Ah Ting* v. *Public Prosecutor* [1974] 2 M.L.J. 37).

CRIMINAL APPEAL.

*Hashim bin Yusof* (Deputy Public Prosecutor) for the appellant.

*Matthew Thomas* (*Sng Kim Kuay* with him) for the respondents.

**Mohamed Azmi J.:** This is an appeal by the Public Prosecutor against the decision of the President Sessions Court Klang, sitting as a Magistrate, made on September 17, 1980, whereby both the respondents were acquitted and discharged at the close of case for the prosecution for an offence under section 135(1)(g) of the Customs Act, 1967. The first respondent was charged for being knowingly concerned on December 15, 1978, in a fraudulent evasion of a prohibition relating to five units of new Porsche cars under the Customs (Prohibition of Imports) Order, 1978, and the second respondent was charged for abetting the first respondent, an offence under section 135(1)(g) read together with section 139 of the Customs Act. The offence against both respondents is punishable under section 135(1)(iii) of the said Act. I note that in the charge against the respondents, the *Gazette* Notification of the Order was wrongly referred to as PU(A) 36/78 instead of PU(A) 37/78.

The main ground of appeal in this case is that the learned President erred in law and in fact in holding that the five Porsche cars were "used cars" when he held in his grounds of judgment that "once the cars were registered, it would mean that they were the subject of a retail sale", without adequately considering the other factors which would make the said cars "new cars".

The facts of the prosecution case may be summarised as follows. On January 31, 1978, Europe Motors Sdn. Bhd. (the first respondent) was appointed by Porsche of West Germany as their Malaysian Representative *vide* Exhibit P18. By letter dated September 19, 1978 (Exhibit P42), the appointment was confirmed, and the first respondent was given the right to distribute Porsche range of sports cars in Malaysia. To put into operation the business arrangement with the manufacturer, the first respondent applied from the Ministry of Trade on July 18, 1978 for Approved Permit to import new Porsche cars to this country, but the application was rejected *vide* Ministry's letter dated November 25, 1978 (Exhibit P2). Before the rejection letter was received, the first respondent had made another application dated September 26, 1978 for Approved Permit to import five units of "any make of used passenger cars/station wagons at $10,000 per unit from West Germany, Japan or England". This application was approved on October 5, 1978. Armed with this Approved Permit to import any type of "used" vehicles from the three countries (Exhibit P3), it is the contention of the prosecution that the first respondent imported five units of "new" Porsche cars from West Germany under the guise of "used" cars. It is their contention that the five units of Porsche cars imported on December 15, 1978 were not covered by the Approved Permit (Exhibit P3) and, as such, a *prima facie* case had been made against both the respondents. The respondents, however, argued that when the five cars were imported at Port

Klang, they were legally "used" cars. They had lost their newness because they had been registered in West Germany in the name of five individual purchasers, viz. Tang Ah Bay (PW22), Poh Siew Har (*f*) (PW23), Tan Lai King (PW26), Teo Kwee Lian (*f*) (PW27) and the second respondent himself. It is also contended that the Superintendent of Customs at Port Klang, Hamzah b. Zainal Abidin (PW8), had examined the five cars and after checking all the documents, he was satisfied that the vehicles were "used" cars and, as such, were covered by Exhibit P3, the Approved Permit. Although the cars looked new, PW8 came to the conclusion, as did the learned President, that they were "used" cars solely because they had been registered in West Germany. In the event, the learned President acquitted them without calling for their defence.

Before going any further, it is important to note that under the Customs (Prohibition of Imports) Order, 1978 — *vide Gazette* Notification No. PU(A) 37/78, classification of completely built up cars are codified under Heading No. 87.02 — 121 for "new" cars, and Heading No. 87.02 — 129 for "old" cars. The term "new car" under the English Trade Descriptions Act, 1968, had come for determination in *Regina* v. *Ford Motor Co. Ltd.*[1] According to the trial judge in that case, the five essential qualities which a new car must exhibit are, firstly, it must not have been sold retail before; secondly, it must be a current model; thirdly, it must not have had extensive use; fourthly, it should be in mint condition as produced at the factory; and fifthly, it should not have been repaired by any third party. On appeal, the Court of Appeal agreed with the first and third tests; disagreed with the fourth and fifth tests; and found it unnecessary to decide on the second test. In delivering the judgment of the appellate court, Bridge J. had this to say at page 1227:

"That a car cannot be new once it has been the subject of a retail sale is obvious; then it is clearly in every sense a second-hand car. Whether or not it is an essential of newness that a car be a current model it is unnecessary to decide. That the use of the car must not be excessive is again clearly right in the sense that a car no doubt ceases to be new once the mileage it has travelled under its own power at all events significantly exceeds that to be expected as reasonably incidental to delivery from the point of manufacture to the dealer."

The word "new" also came for determination in *Morris Motors, Ltd.* v. *Lilley.*[2] At page 739, Wynn-Parry J. said:

"I therefore prefer to take as the simple test of when a car is new simply this: that it remains new even when it leaves the manufacturer's hands, until it is made the subject of a retail sale by a distributor or dealer, it is registered with the local country council, number plates are put on it and it is driven away by the purchaser."

The word "old" has not been defined judicially as far as I am aware. The ordinary dictionary meaning of "old" in relation to a thing is: "Having existed long; long made; that has been long in use (opposite to new)" — see *Shorter Oxford English Dictionary.* In the circumstances, I am of the view that there must be substantial usage of the car before it ceases to be new and can qualify as "old". In the context of the Customs (Prohibition of Imports) Order, 1978, I think it is not wrong administratively to equate "old car" with "used car". However, since the legislature has employed the word "old" and not "used", it would be better for all concerned to use the term "old cars" instead of "used cars" so that possible confusion and ambiguity may be avoided.

In the present case, it is for the prosecution to prove that the five Porsche cars were "new" cars at the time of importation. Unless the cars were "new" as opposed to "old", the respondent cannot be said to have committed any offence since they did have an Approved Permit to import five old cars of any type at the material time. On the other hand, if the cars were new, then they could not be covered by the said Approved Permit, and if the prosecution could prove that the first respondent did so knowingly in a fraudulent evasion of the prohibition, then a *prima facie* case would have been established; and if abetment by the second respondent were proved, then a *prima facie* case would also have been established against him.

Having regard to the two English authorities, I am of the view that mere registration of the five Porsche cars in West Germany in the name of five individuals, does not by itself make them "old cars" or "used cars" on importation. To conclude that a retail sale is established solely because the cars were registered is an over-simplification and erroneous statement of the law in the context of the Customs (Prohibition of Imports) Order, 1978. Apart from registration, other facts of the case must also be considered to determine whether a car has been the subject of retail sale. Applying the two English authorities to the present case, I hold that for the purpose of the Customs (Prohibition of Imports) Order, 1978, a car must exhibit two essential qualities before it can be classified as "old" under Heading No. 87.02 — 121. To put it in another way, a car ceases to be "new" under Heading No. 87.02 — 129, if, firstly, it has been the subject of a retail sale with a dealer or distributor, and, secondly, it has been the subject of substantial use, in that the mileage it has travelled under its own power has significantly exceeded that to be expected as reasonably incidental to delivery from the point of manufacture to the dealer or distributor.

Adopting the above tests to the instant case, the first question to be asked is: at time of importation, was there a retail sale between the five persons in whose names the cars had been registered in Germany and a dealer or distributor? The answer is in the negative. The evidence showed that it was the first respondent who ordered for the cars from the manufacturer, paid for them, registered them in the names of the five persons and then imported them to this country. There was no evidence that the first respondent as dealer or distributor had ever sold the cars to the five registered persons. At all material times, the cars were never in the possession of the five registered owners. As was held by the Court of Appeal in *Central Newbury Car Auctions, Ltd.* v. *Unity Finance, Ltd. & Anor.*,[3] the registration book was not a document of title to the car. Thus, merely because the cars in the present case were in the registered name of the five persons on importation it does not follow that they were the legal owners and that there had been a retail sale. The evidence clearly

show that the first respondent was the legal owner. The respondents' contention that the five individuals were both the registered and legal owners is not supported by the evidence. There was also no evidence that the cars had been the subject of a retail sale with the manufacturer although there was evidence of wholesale by the manufacturer to the first respondent. Apart from the evidence of registration of the cars, there was in fact no evidence of any sale at all in which the five registered persons were involved. They or their agents never went to Germany and they never paid a single cent for the cars either to the manufacturer or the first respondent. There was no consideration given by them for the alleged sale. In the absence of evidence of purchase by them, the question of retail sale by dealer or distributor did not arise. If there was no retail sale, then the new Porsche cars would remain new on importation. The second question to be asked is: at the time of importation, had the cars been subjected to substantial use? The answer is again in the negative. The evidence showed that four of the cars were found to have done only 70 km, i.e. about 43 miles when pre-delivery inspection was carried out by PW15 and PW16 at Segambut, Kuala Lumpur, at the instance of the second respondent. The distance between Port Klang and Segambut being around 25 miles, it can reasonably be inferred that there was no substantial usage of the cars so as to qualify them to be legally treated as "old cars". They were therefore legally and factually "new" and therefore not covered by the Approved Permit Exhibit P3.

In this case, the learned President had failed to consider the evidence adduced by the prosecution which showed that at time of importation there was in fact no retail sale; that the five persons in whose names the cars had been registered were not the purchasers or the legal owners; that there was no substantial usage of the cars by any of the purported purchasers or their agents; and that on importation, three of the cars were in fact sold as new cars by retail sale to *bona fide* customers.

As regards knowledge and fraudulent evasion, there was evidence that the purported five purchasers were the close relatives of the second respondent. Poh Siew Har (PW23), in whose name car Exhibit P13C was registered, is the wife of second respondent. This car, like the other four, was never driven away by the purported purchaser or her agent from the premises of a dealer or distributor, and this particular car was eventually seized by the Customs in the showroom of first respondent in Kuala Lumpur. C.K. Wong (PW24), in whose name car Exhibit P13E was registered, is the nephew of second respondent, and the car was sold as new by retail sale to one Tengku Setia Raja through Loh Weng Chong (PW17), a car dealer in Kuala Trengganu. Tan Lai King (PW26), in whose name Porsche car Exhibit P13D was registered, is also a nephew of second respondent, and the car was also seized by the Customs. Teo Kwee Lian (PW27), in whose name the car Exhibit P13A was registered, is the niece of second respondent and the car was in fact sold as new by retail sale to Choong Huat Khean (PW18). The car registered in the name of second respondent was also sold as new by retail sale to Tang Ah Bay (PW22). As stated earlier, none of the purported purchasers or their agents went to Europe in connection with the cars. None of them paid a single cent to anyone either by way of deposit or otherwise in respect of the vehicles. From all this evidence, the inference is irresistible. The inference is that the so-called five retail purchasers were not in fact purchasers. There was in fact no retail sale and that the respondents had merely used their names for the purpose of registering the cars in Germany intending that by such registration the new cars could be imported to Malaysia by using Approved Permit for old cars. The sale was between first respondent as dealer and the manufacturer and therefore not a retail sale. It can reasonably be inferred that the whole operation had been pre-planned, and from the conduct of the respondents both before and after importation, the prosecution had proved beyond reasonable doubt that they knew that new cars could not be imported without obtaining the proper Import Permit, and by registering the cars in the names of the second respondent, his wife, two nephews and a niece, there can be no doubt that both the respondents were knowingly concerned in a fraudulent evasion of the prohibition imposed by PU(A) 37/78, and the second respondent was all along abetting the first respondent by using members of his family as registered owners instead of importing the new cars unregistered or registered in the name of first respondent. Indeed, the fraudulent intent of the respondents is also shown by the fact that the offence was committed on December 15, 1978, i.e. after the respondent's application for Approved Permit for new Porsche cars had been rejected and before it was subsequently approved on appeal. Indeed, the *mens rea* is confirmed by the written statement of second respondent (Exhibit P45).

As regards the evidence of Encik Hamzah (PW8), the Superintendent of Customs at Port Klang, it is true that the test that he applied in the importation of foreign cars was based solely on registration. But it should be noted that he merely acted on the particulars given by the respondents in the Import Declaration Forms, and it is doubtful whether he would have come to the same conclusion had he known that the registration of the cars in Germany in the names of the five persons was merely a cover-up and that in effect no actual retail sale had taken place.

In the circumstances, I allow this appeal. The order of acquittal and discharge is set aside. The case is remitted to the same President for the defence of both respondents to be called after the charges have been amended as regards the particulars of *Gazette* Notification.

*Appeal allowed.*

Solicitors: *Sng & Matthew.*